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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

No. R-15-0028

PETITION TO AMEND RULE 31.5,
ARIZONA RULES OF CRIMINAL
PROCEDURE

**COMMENT OF ARIZONA
ATTORNEYS FOR CRIMINAL
JUSTICE**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) submits the following comment to the above-referenced petition. AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

DISCUSSION

AACJ agrees, in principle, with the proposed amendment. This Court set forth that previously represented defendants may decide to represent themselves on appeal in *Coleman v. Johnsen*, 235 Ariz. 195, ¶ 1 (2014). Balancing this right with the need for orderly proceedings and a victim's right to a prompt conclusion, this Court held, "previously represented defendants must give notice of their request to represent themselves no later than thirty days after filing the notice of appeal." *Id.* at ¶ 17. The proposed amendment to Rule 31.5 implements this thirty day time limit.

However, the proposed change to Rule 31.5 does nothing to notify defendants of the quick deadline. Defendants who wish to represent themselves on appeal may lose out on the opportunity merely because they were never notified of the deadline for filing their intent. While there is no advisement analog for self-representation during trial, there is also no deadline analog for such a decision. During the trial phase, a defendant must choose to proceed pro per "before meaningful trial proceedings have commenced," which courts have interpreted to mean before the jury is empaneled." *State v. Lamar*, 205 Ariz. 431, ¶ 22 (2003). Applying the same "meaningful proceedings" concept to the appellate process would suggest a defendant could elect to proceed pro per before the opening brief is filed. *See Coleman*, 235 Ariz. 195, ¶ 18 (citing *Commonwealth v. Grazier*, 552

Pa. 9, 713 A.2d 81, 82 (1998)). Thus, without notice, a defendant would reasonably believe she could notify the Court of her intent to represent herself at any point before the opening brief is filed. Because the deadline created by *Coleman* and implemented by the proposed amendment substantially shortens this timeline, a defendant should be advised of the deadline.

Accordingly, AACJ proposes two additional changes to supplement the Petition to Amend Rule 31.5: (1) a change to Rule 26.11 requiring the trial court to advise defendants of the deadline and (2) a change to Form 23 advising defendants of the deadline. By notifying all defendants of the deadline for choosing to proceed pro per on appeal, these two additions ensure the effectiveness of the proposed amendment to Rule 31.5.

ATTACHMENT 1¹

Arizona Rules of Criminal Procedure

Rule 26.11. Duty of the court after pronouncing sentence

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that failure to file a timely appeal will result in the loss of the right to appeal.

b. If he or she is entitled thereto, advise the defendant that:

- (1) If the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent him or her on appeal; and
- (2) If the defendant is unable to pay for a certified copy of the record on appeal and the certified transcript, they will be provided by the county.

c. Advise the defendant that he or she may waive the right to appellate counsel by filing a written notice no later than thirty days after the filing of the notice of appeal.

ed. Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

¹ Additions are indicated by underlining and deletions are indicated by ~~strikeouts~~.

ATTACHMENT 2

Form 23. Notice of Rights of Review after Conviction in Superior Court

Caption [No change in text.]

RIGHT TO APPEAL (CAPITAL) [No change in text.]

RIGHT TO APPEAL (NON-CAPITAL) [No change in text.]

IN ORDER TO EXERCISE YOUR RIGHT TO APPEAL;

1. You must file a NOTICE OF APPEAL (Form 24(a)) within 20 days of the entry of judgment and sentence. If you do not file a notice of appeal within 20 days you will lose your right to appeal. The entry of judgment and sentence occurs at the time of sentencing.
2. To file a Notice of Appeal you should contact your lawyer, by letter, telephone or in person, telling him or her that you want to appeal. You can file the notice of appeal before you leave the courtroom on the day you are sentenced if you wish.
3. If you do not have a lawyer, get copies of Form 5, Defendant's Financial Statement and Request for Appointment of Counsel and Form 24 (a), Notice of Appeal, either from the clerk of the court, jail, or the prison, fill them both out and file or send them to the clerk of the superior court in the county where you were tried and sentenced. They must arrive at the clerk's office within 20 days after you were sentenced.
4. You should have a lawyer handle your appeal. If you choose to waive your right to appellate counsel, you must file a written notice no later than thirty days after filing the notice of appeal. If the notice of waiver is given before the notice of appeal is filed, it must be filed in the trial court. If the notice of waiver is given after the notice of appeal is filed, it must be filed in the Appellate Court. The Court may appoint advisory counsel during any stage of the appellate proceedings.

RIGHT TO POST-CONVICTION RELIEF (CAPITAL) [No change in text.]

RIGHT TO POST-CONVICTION RELIEF (NON-CAPITAL) [No change in text.]

RECEIPT BY DEFENDANT [No change in text.]